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Nos. 82-354, 82-355, 82-598

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, *et al.*,
*Petitioners,*
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
*Respondents.*

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
*Petitioners,*
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
*Respondents.*

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
*Petitioners,*
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals illegally restricted the authority of the National Highway Traffic Safety Administration to rescind its passive restraint mandate when it ruled that that safety standard had almost, but not quite, been approved by Congress.

2. Whether the court went beyond the proper scope of judicial review in overturning the agency's decision to rescind a far-reaching regulation which it could no longer determine to be effective.

## PARTIES BELOW

There were two consolidated cases in the Court of Appeals. The parties below were as follows:

1. *Civil Action No. 81-2220*

a. *petitioners*—State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, and Leorlin Boyd;

b. *respondents*—Department of Transportation, Drew Lewis, as Secretary, National Highway Traffic Safety Administration, and Raymond A. Peck, Jr., as Administrator;

2. *Civil Action No. 81-2221*

a. *petitioners*—National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung;

b. *respondent*—National Highway Traffic Safety Administration;

3. *Intervenors in Both Cases*

a. *in support of the insurance companies, et al.*—Albert B. Lewis, New York State Superintendent of Insurance;

b. *in support of the agency*—Automobile Importers of America, Inc., Consumer Alert * and Pacific Legal Foundation,** Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corp., Checker Motors Corp., Chrysler Corp., Ford Motor Co., General Motors Corp., and Volkswagen of America, Inc.

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* Consumer Alert is a nonprofit organization incorporated in the District of Columbia, with headquarters in California. Consumer Alert has no parent companies, affiliates, or subsidiaries.

** Pacific Legal Foundation is a nonprofit organization incorporated in California. Pacific Legal Foundation has no parent companies or subsidiaries, but it is affiliated with the College of Public Interest Law, a fellowship program for law school graduates.

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## BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

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### OPINIONS BELOW

The opinion of the Court of Appeals overturning the decision of the National Highway Traffic Safety Administration (NHTSA) is officially reported as *State Farm Mutual Automobile Insurance Co. v. Department of Transportation*, 680 F.2d 206 (D.C. Cir. 1982). The opinion is reprinted in the appendix to the petition for certiorari of the Motor Vehicle Manufacturers Association, *et al.* (MVMA App.) at 1a. The judgment of the Court of Appeals is reprinted in the MVMA Appendix at 160a. The order and supporting memorandum of the Court, establishing September 1, 1983, as the compliance date for the passive restraint mandate, have not

been officially reported but are set forth in the MVMA Appendix at 79a. NHTSA's decision to rescind its prior rule on passive restraints is published at 46 Fed. Reg. 53,419 (1981), and is reprinted in the MVMA Appendix at 88a.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 15 U.S.C. § 1394(a)(4).

The decision of the Court of Appeals was issued on June 1, 1982, and its order setting a compliance date was issued on August 4, 1982. On August 4, the court also denied motions for an extension of time in which to seek rehearing. MVMA App. at 83a. No rehearing was requested in this case.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the validity of NHTSA's decision to rescind its passive restraint mandate. Under that mandate, automatic front-seat occupant restraints would be required in all new cars, beginning with large and mid-size cars manufactured on or after September 1, 1982. The passive restraint mandate, as well as the decision to rescind it, was issued under the National Traffic and Motor Vehicle Safety Act of 1976 (the Safety Act), as amended, 15 U.S.C. §§ 1381, *et seq.*, MVMA App. at 163a. The regulation itself, Federal Motor Vehicle Safety Standard No. 208, is contained in 49 C.F.R. § 571.208 (1981); the amended provisions appear at 46 Fed. Reg. 53,427 col. 2, MVMA App. at 120a.

NHTSA's decision was reviewed by the Court of Appeals pursuant to 5 U.S.C. § 706 of the Administrative Procedure Act (APA) (MVMA App. at 162), which is applicable to this proceeding under 15 U.S.C. § 1394(a)(3) and § 1410b(c)(2).

## STATEMENT OF THE CASE

Consumer Alert and Pacific Legal Foundation hereby adopt the statement of the case contained in the brief of the Department of Transportation (DOT).

## SUMMARY OF ARGUMENT

In overturning NHTSA's rescission of the passive restraint mandate, the Court of Appeals relied on the premise that this mandate had almost, but not quite, been endorsed by Congress. This view, however, was based solely on *post hoc* unenacted congressional reaction. Such informal legislative expressions do not amend or repeal the statutory authorization under which NHTSA operates. Under the Safety Act, the agency has broad powers to issue, amend, and rescind automotive safety standards. Nothing in the language or legislative history of that act suggests any congressional intent to restrict NHTSA's power in regard to passive restraints.

The congressional reaction relied upon by the court does not alter this construction of the Safety Act. The court's reading of this congressional reaction is contradicted by enacted legislation on the issue.

On the basis of this almost-but-not-quite congressional approval, the court proceeded to apply an unjustifiably intrusive standard of review to NHTSA's action. The court placed the burden of proof on the agency, and reweighed the evidence in areas where the agency's judgment was entitled to special deference. The agency's forecast of public reaction, its assessment of equitable issues, and its interpretation of the ignition interlock episode were all brushed aside despite their support in the record.

Because the Court of Appeals applied an unfounded and unprecedented standard of review, its decision should be reversed. Because the court declared that its judgment would be the same under any standard of review, this Court should uphold NHTSA's decision on the merits.

## ARGUMENT

### INTRODUCTION

The length and temperature of the debate over the passive restraint mandate tend to obscure a basic fact—it is the American public which will be the ultimate beneficiary of the mandate, or its ultimate victim. For this reason, it is important to remember just what position the public has taken on this issue, and what choices the public would have with or without a regulatory mandate of these devices.

A large segment, if not majority, of the American people opposes any federal imposition of passive restraints. Of the thousands of letters received by NHTSA in its 1976 proceeding on this issue, those opposing a mandate outnumbered those in favor by more than three-to-two. DOT, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection* 55 n.57 (1976), Court of Appeals Joint Appendix (C.A.J.A.) at 2,122.[1] In the 1981 proceeding, approximately half of the comments received from private citizens were in opposition to a mandate. 46 Fed. Reg. 53,429 col. 3, MVMA App. at 129a.

When air bag-equipped cars were offered for sale in the mid-1970's, they were rejected by the marketplace. NHTSA, *Final Regulatory Impact Analysis* IX-20 (1981), C.A.J.A. at 235. Cars equipped with passive belts have been sold since 1975, and they continue to be available for those who desire to purchase them. *See* 680 F.2d at 215 n.12, MVMA App. at 18a-19a.

This last situation illustrates the alternatives which the public would face depending upon how this issue is

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[1] Copies of the extensive joint appendix which was before the Court of Appeals have been lodged with this Court. In order to distinguish this from the far shorter joint appendix which was prepared for this Court, the former document will be referred to as C.A.J.A. in this brief.

resolved. In the absence of a passive restraint mandate, those who favored it can still purchase cars equipped with passive belts, or they can use conventional seat belts which are equally effective. Under a mandate, that large proportion of the public opposed to it would have no choice but to pay for it and live with it, just as the public had to pay for and endure NHTSA's past imposition of ignition interlocks.[2]

NHTSA has decided not to impose passive restraints. As is shown below, that decision was legally valid in all respects.

## I

## THE COURT OF APPEALS BASED ITS STANDARD OF REVIEW ON AN ASSERTED ALMOST-BUT-NOT-QUITE CONGRESSIONAL APPROVAL OF THE PASSIVE RESTRAINT MANDATE; THIS STANDARD IS AS UNFOUNDED AS IT IS UNPRECEDENTED

The standard of review applied by the Court of Appeals is the key issue in this case. The court devoted one-third of its lengthy opinion to formulating the standard which it used. *See* Section II of the opinion below, 680 F.2d at 218-30, MVMA App. at 24a-49a. Despite the fact that NHTSA's enabling legislation is totally silent on the question of whether passive restraints should be mandated, the court based its review on a supposed almost-but-not-quite congressional approval of such a mandate. Despite the fact that agency action is entitled to a presumption of validity, the court decided that it was not the insurance companies but "NHTSA [which] has the burden of . . . show-

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[2] These devices prevent the starting of a car unless its front-seat occupants have buckled their seat belts. NHTSA required their installation in new cars between 1973 and 1975. *See Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1341 & n.14 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Most of the devices were soon deactivated by a "furious" public, and Congress quickly banned their requirement. 680 F.2d at 222, MVMA App. at 33a; *see* 15 U.S.C. § 1410b(b)(1).

ing that rescission of Modified Standard 208 was reasonable." 680 F.2d at 229, MVMA App. at 47a. These rulings, which lie at the heart of the court's decision, are without any legal basis whatsoever.

### A. NHTSA's Action Is Subject to the Traditional Standard of Review for Informal Rule Making, Coupled With the Requirement that the Agency Adequately Explain Its Reversal of a Prior Decision

As the Court of Appeals recognized, NHTSA's decision to rescind Standard 208 is the result of informal rule making conducted under 5 U.S.C. § 553 of the APA, which applies to this safety standard pursuant to 15 U.S.C. § 1392(b) and § 1410b(c)(2). *See* 680 F.2d at 218, MVMA App. at 24a-25a. Prior court decisions on Standard 208 are in agreement on this point. *See Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343, *cert. denied*, 444 U.S. 830 (1979); *Chrysler Corp. v. DOT*, 472 F.2d 659, 667-68 (6th Cir. 1972). In the Court of Appeals' own words, the applicable standard of review is the "well established [and] familiar 'arbitrary and capricious' test." 680 F.2d at 218, MVMA App. at 25a.

Familiar as this test is, its elements bear repeating. There is a presumption that the agency's action is valid, but this does not shield it from "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The agency must have engaged in a "consideration of the relevant factors" (*id.* at 416) and there must be "a rational basis for its treatment of the evidence," but the standard "does not require more." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). While the court's

> "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416.

The fact that NHTSA's action reversed a prior decision adds an additional element—the requirement that this reversal be adequately explained. As the court stated in *Pacific Legal Foundation*, which involved an *earlier* policy reversal on Standard 208,

> "because the order under review here reversed a prior policy, the agency must provide 'an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.' [Footnote omitted.]" 593 F.2d at 1343-44, *quoting from Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

While such a change may cause the court's review to be "heightened somewhat" (*NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982)), it does not alter the "highly deferential" nature of that review. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). Even when rules are repealed, "a court should defer to the administrative judge as to whether conditions have in fact changed and what action, if any, is now warranted." *NAACP*, 682 F.2d at 998. "The test is *still* whether the agency's decision is rational and based on the record." *Id.* (emphasis added).

As is shown below, the test which the Court of Appeals applied to NHTSA's decision was nothing of the sort.

### B. The Court of Appeals Had No Justification for Reversing the Burden of Proof and Placing It on NHTSA

When administrative actions are challenged, the burden of proof lies on the challenger, not the agency:

> "Administrative actions are presumed to be valid. The burden is on the party challenging them to overcome that presumption." *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n.38 (D.C. Cir. 1977).

The Court of Appeals, however, held that it was not the insurance companies but "*NHTSA* [which] has the burden . . . of showing that rescission of Modified Standard 208 was reasonable." 680 F.2d at 229, MVMA App. at 47a (footnote omitted; emphasis added). It based this reversal of the burden of proof on its finding that there was a "course that Congress has set" on the issue of passive restraints. 680 F.2d at 242, MVMA App. at 74a. Despite the fact that there is not one single piece of enacted legislation which endorses the passive restraint mandate, the court ruled that this regulation had been "essentially confirmed" by Congress. 680 F.2d at 229, MVMA App. at 47a. Given this congressional "confirmation," the court replaced the "well established" and "familiar" deferential standard of review with something entirely different. According to the court,

> "[j]udicial scrutiny of agency action . . . depends on the extent to which the agency has deviated from congressional expectations. An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress." 680 F.2d at 229, MVMA App. at 48a.

It will be shown that the path which the court referred to was not marked by Congress; it was created by the court itself. Contrary to the court's assertions, neither the Safety Act, nor the 1974 amendments to that act, nor any congressional action since then restricts NHTSA's discretion to rescind Standard 208. To the extent that Congress *has* spoken on this issue, it has disaffirmed rather than endorsed the imposition of these devices on the American public.

### 1. *NHTSA's Statutory Power To Rescind Standard 208 Is Not Restricted by an Alleged Almost-But-Not-Quite Congressional Approval of the Passive Restraint Mandate*

The Safety Act states that the Secretary of Transportation "may by order amend *or revoke any* Federal motor

vehicle safety standard established under this section." 15 U.S.C. § 1392(e) (emphasis added). This authority has been delegated to the Administrator of NHTSA under 49 C.F.R. § 501.2(a) (1981). If there is a statutory limitation on NHTSA's power to rescind the passive restraint mandate, it must be contained in either this or another statute.

The Court of Appeals did not identify any statutory provision which limits NHTSA's power in regard to Standard 208. Instead, it claimed that

> "the legislative history of the 1974 Amendments to the Safety Act and the subsequent congressional reaction to Modified Standard 208 suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." 680 F.2d at 222, MVMA App. at 32a.

It was on this basis that the court reversed the burden of proof, creating an entirely new scope of review "lest the congressional will be ignored." 680 F.2d at 228, MVMA App. at 46a. The court flatly rejected the contention "that the congressional actions and failures to act described [in its discussion of the legislative history] have no bearing on the agency's freedom to regulate on this question." 680 F.2d at 229, MVMA App. at 47a.

NHTSA's "freedom to regulate," however, is a matter of statutory authorization. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. [Footnote omitted.]" *Stark v. Wickard*, 321 U.S. 288, 309 (1944). The court's ruling that NHTSA's discretion regarding passive restraints was restricted must have some basis in *enacted* legislation; it must rest on "a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority." *Western Union Telegraph Co.*

*v. FCC*, 541 F.2d 346, 354 (3d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).

The Safety Act cannot reasonably be construed to require that NHTSA mandate passive restraints. The provision on motor vehicle safety standards sets forth the criteria which these standards must meet and the manner in which they shall be promulgated, but it does not direct the establishment of any *specific* automobile safety standard. *See* 15 U.S.C. § 1392(a)-(h). By comparison, when Congress intended that certain specific standards be set, it made this clear. Under 15 U.S.C. § 1392(i), for example, Congress mandated the issuance of standards covering eight different aspects of school bus equipment and performance. Congress similarly required NHTSA to establish a standard for automotive fuel system integrity. Pub. L. No. 93-492, § 108, 88 Stat. 1470 (1974). The fact that Congress specifically set forth these exceptions to its general grant of authority over safety standards suggests that "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980).

The legislative history cited by the court does not establish any contrary congressional intent. With one exception which is discussed later (*see* pages 13-14, *infra*, in regard to the Safety Act's 1974 amendments), that history postdates the amended act. "[*P*]*ost hoc* legislative history is entitled to little weight" (*Haire v. Calloway*, 526 F.2d 246, 249 n.4 (8th Cir. 1975), *vacated on other grounds*, 537 F.2d 318 (8th Cir. 1976)) inasmuch as "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960).[3] Even if it

[3] This is especially true with respect to the "less formal types of subsequent legislative history," such as a "mere statement in a conference report." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). The post-1974 history

were true that a subsequent Congress desired that passive restraints be mandated, this would be irrelevant to the construction of the Safety Act. "It is the intent of *the Congress that enacted* [*the law*] . . . that controls." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (emphasis added).

In ruling that the legislative history establishes "congressional approval" of a contrary "interpretation of the statutes" by NHTSA (680 F.2d at 229, MVMA App. at 47a), an interpretation that *required* NHTSA to impose passive restraints, the Court of Appeals committed a fundamental error. *It mistook NHTSA's earlier mandate of passive restraints to be an act of statutory construction, when in fact it was an exercise of discretionary power.*

None of NHTSA's past pronouncements on Standard 208 contain any serious suggestion that the agency viewed itself as being statutorily *compelled* to mandate passive restraints. The agency's actions on this issue always were, and continue to be, matters of administrative judgment and discretion rather than of legislative command. Thus, in 1972, the Sixth Circuit "conclude[d] that the issue of the relative effectiveness of active as opposed to passive restraints is one which has been duly delegated to the Agency, with its expertise, to make . . . ." *Chrysler Corp.*, 472 F.2d at 675. In 1979, the D.C. Circuit found that "Secretary Adams provided a sufficient explanation why his judgment differed from his predecessor's" and that he had not "abused his discretion" in evaluating air bags. *Pacific Legal Foundation*, 593 F.2d at 1346, 1347.[4] The court's reliance on NHTSA's

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cited by the court could not have been any less formal because, as the court admitted, none of those congressional responses were ever enacted. 680 F.2d at 228, MVMA App. at 46a.

[4] In fact, regulatory issues of this nature generally involve the *broadest* range of administrative discretion:

> "[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashion-

previous passive restraint rule as evidencing some "mandate . . . received from Congress" (680 F.2d at 242, MVMA App. at 74a) is simply misplaced.

NHTSA's power to rescind its passive restraint mandate under 15 U.S.C. § 1392(e) has not been restricted by Congress. As this Court recently stated, "indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981).[5] The unenacted reaction of a subsequent Congress to NHTSA's exercise of statutory power is precisely that—unenacted. It cannot serve to restrict NHTSA's delegated authority.[6] Contrary to the Court of Appeals' assertion, it indeed has "*no* bearing on the agency's freedom to regulate on this question." 680 F.2d at 229, MVMA App. at 47a (emphasis added).

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ing of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives. [Footnote omitted.]" *Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 159 (D.C. Cir. 1967).

It is precisely through such discretionary power that "Congress places a premium upon agency expertise." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966).

[5] In the *St. Martin* case, moreover, the "indefinite congressional expressions" were related to enacted legislation. By comparison, the indefinite congressional expressions upon which the Court of Appeals relied never even became law; in its words, "[n]one of these acts carries the weight of positive law, of course." 680 F.2d at 228, MVMA App. at 46a.

[6] In ruling that a one-house congressional veto is unconstitutional, the District of Columbia Circuit recently stated that

> "rulemaking is substantially a function of administering and enforcing the public law. As such, Congress may not create a device enabling it, or one of its houses, to control agency rulemaking. Congress' duty to oversee agency action is connected with its ultimate power of revising the laws under which the agency operates. The creation of further congressional power violates the Constitution." *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425,

### 2. *In Fact, Congress Has Not Endorsed the Passive Restraint Standard*

The Court of Appeals stated that "each time Congress reviewed the passive restraint standard it was essentially confirmed." 680 F.2d at 229, MVMA App. at 47a. This alleged uniformity of congressional reaction is belied by every proposal on passive restraints which Congress enacted into law.

1. In 1974, Congress reacted to the ignition interlock fiasco by prohibiting the requirement of these devices under any motor vehicle safety standard. *See* page 5 n.2, *supra*. The resulting amendment to the Safety Act also provided that any future "nonbelt" safety standard could be promulgated only in accordance with specified provisions for public and congressional input. *See* 15 U.S.C. § 1410b, added to the Safety Act by Pub. L. No. 93-492, Title I, § 109, 88 Stat. 1482 (1974). Such a standard would, furthermore, be subject to congressional veto by concurrent resolution. *See* 15 U.S.C. § 1410b(d).[7]

The Court of Appeals treated this episode as one example of the alleged "congressional commitment" to mandatory passive restraints, on the ground that Congress "did not foreclose NHTSA's pursuit of a passive restraint standard." 680 F.2d at 228, MVMA App. at 46a. In fact, however, these 1974 amendments suggest

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471 (D.C. Cir. 1982), *petition for cert. filed sub nom. United States Senate v. Consumer Energy Council of America*, 51 U.S.L.W. 3212 (U.S. Sept. 28, 1982) (No. 82-177).

In relying on unenacted *post hoc* congressional expressions to restrict NHTSA's rule-making discretion, the court has created a new instrument of congressional power which is no less powerful than the one-house veto. At the same time, the informality of this new instrument leaves no doubt as to its illegality.

[7] According to the court, these provisions were adopted as a compromise replacement for a proposal which would have flatly prohibited passive restraints and which the House of Representatives had "passed overwhelmingly." 680 F.2d at 222-23, MVMA App. at 33a-34a.

just the opposite. There was no passive restraint requirement in effect at the time that these amendments were enacted, and the result of the new law was to limit the agency's ability to add such a requirement. In the court's own words, "the 1974 Amendments sharply reduced DOT's discretion to modify Standard 208 in the future." 680 F.2d at 210-11, MVMA App. at 8a.[8]

This limitation on the agency's ability to mandate passive restraints obviously was not a congressional endorsement of the idea. If anything, it suggests exactly the opposite. Yet the court nonetheless included this episode in its claim that "each time Congress reviewed the passive restraint standard it was essentially confirmed." 680 F.2d at 229, MVMA App. at 47a.

2. In both 1978 and 1979, Congress prohibited DOT from using appropriated funds to enforce a passive restraint mandate. Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978); Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, Title III, § 317(a), 93 Stat. 1023, 1039 (1979).[9] Admittedly, this legislation may

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[8] The court in *Pacific Legal Foundation* characterized the 1974 legislation in nearly identical words, stating that it "limited DOT's discretion to amend Standard 208 in the future." 593 F.2d at 1341.

[9] The relevant provision of the 1978 legislation reads:

"Sec. 317. None of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system).

"Sec. 318. Nothing in section 317 of this title shall be construed to prohibit the use of funds for any research and development activity relating to occupant restraint systems."

The 1979 legislation is practically identical on this point:

"Sec. 317.(a) None of the funds provided in this Act may be used to implement or enforce any standard or regulation which

have been largely symbolic because the mandate was not scheduled to take effect until 1981. 680 F.2d at 225, MVMA at 38a. Nonetheless, it was a disaffirmation of the mandate. Like the 1974 amendments, these two appropriation acts flatly contradict the court's claim that Congress endorsed the mandate each time it reviewed it. Rather, Congress apparently did exactly the opposite.

Only by totally misreading these episodes could the court conclude that the legislative history establishes an almost-but-not-quite congressional approval of Standard 208—in its words, that

> "the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." 680 F.2d at 222, MVMA App. at 32a.

The court's opinion is replete with references to "the path marked by Congress," "the course that Congress has set," and "the mandate . . . received from Congress" on passive restraints. 680 F.2d at 229, 242, MVMA App. at 48a, 74a. As both the 1974 amendments to the Safety Act and the 1978 and 1979 appropriation acts indicate, Congress has set no such course on this issue. The court accused NHTSA of "err[ing] when it presumes that it knows how to speak more clearly than Congress" (680 F.2d at 235, MVMA App. at 60a), but it is the court which engaged in this presumption. If Congress wishes to require NHTSA to take some specific action on passive restraints, it is perfectly capable of doing so. It has not. The "path marked by Congress" which the court claimed to discern in the labyrinthine legislative history of Standard 208 is, in reality, no more than a trail blazed by the court itself. NHTSA is not required to follow that trail

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requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system).

"(b) Nothing in this section shall be construed to prohibit the use of funds provided in this Act for any research and development activity relating to occupant restraint systems."

in lieu of its own judgment, and it is the height of judicial intrusiveness for the court to order that it do so.

## II

### IN OVERRULING NHTSA'S ASSESSMENT OF PUBLIC REACTION, THE COURT IMPROPERLY IMPOSED ITS OWN JUDGMENT ON MATTERS UNIQUELY WITHIN THE AGENCY'S EXPERTISE

Having declared that it was NHTSA's burden to justify its departure from the asserted path marked by Congress, the court proceeded to displace NHTSA's judgment on the key issue—the predicted usage rate of detachable automatic belts under a passive restraint mandate.

The court stated that this basic question involved NHTSA's forecast of future events:

> "The rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up." 680 F.2d at 231, MVMA App. at 51a.[10]

The law is clear that in such areas agencies are entitled to even more flexibility than usual in their decision making. "It is important . . . that *greater* discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions." *NAACP*, 682 F.2d at 1001 (citations omitted; emphasis added). In such cases, where an agency's decisions

> "rest on judgment and prediction rather than pure factual determinations . . . . complete factual support for [its] ultimate conclusions is not required, since 'a

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[10] The court upheld NHTSA's explanation of the first two steps in its decision. The first step, NHTSA's "prediction of how industries plan to comply" with the mandate, was characterized by the court as "exactly the sort of factual question on which the agency's expert 'administrative feel' deserves the greatest deference." 680 F.2d at 230, MVMA App. at 50a. The second step, NHTSA's conclusion that "a detachable belt, once detached, is functionally equivalent to a manual belt," was also upheld. *Id.*

> forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' [Footnote omitted.]" *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981), *quoting Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

As is shown below, the Court of Appeals accorded NHTSA no deference whatsoever on its assessment of anticipated belt usage rates; instead, the court engaged in its own reweighing of the evidence.

### A. In Rejecting NHTSA's Prediction of Future Belt Usage Rates, the Court Went Beyond Its Proper Reviewing Function and Simply Reweighed the Evidence on Its Own

NHTSA had concluded that, because most car manufacturers would comply with a passive restraint mandate by means of detachable passive belts, it had no reason to believe that these belts would be used to any significantly greater extent than conventional belts. 46 Fed. Reg. 53,423 cols. 1-2, MVMA App. at 104a. While the court agreed with NHTSA's conclusion regarding the anticipated manufacturer response (*see* n.10, *supra*), it scathingly rejected NHTSA's reasoning on the usage rate issue, claiming that the agency had "turned the question on its head and thus totally misdirected its analysis":

> "[T]he question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. *NHTSA has some burden . . . to show* that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so." 680 F.2d at 231, MVMA App. at 51a (emphasis added).

Once again, the court placed the evidentiary burden on NHTSA rather than on those challenging the agency. In determining whether or not to continue to regulate, how-

ever, it is NHTSA's prerogative, and not the court's, to decide how to approach this question. While the agency is required to explain its action, it is not required to adhere to some fixed formulation of the issue.

The court ruled that NHTSA's decision "was supported by no record evidence whatsoever" because "it rested its decision only on 'substantial uncertainty' about [future usage] rates." 680 F.2d at 232, MVMA App. at 53a-54a. It is clear, however, that NHTSA had more than adequate reasons for doubting that detachable belts would produce any significant increase in usage rates.

NHTSA had concluded that the high use rate in the passive belt-equipped Rabbits and Chevettes which have been sold to date was not representative of what would occur under a mandate. This conclusion was based on: (1) the fact that subcompact cars such as Rabbits and Chevettes *generally* exhibit higher than average belt use rates, even when not equipped with passive belts (46 Fed. Reg. 53,421 col. 2, MVMA App. at 97a-98a); (2) the special features of the passive belts in these models which made them generally nondetachable and which would not be present in belts installed under the mandate (*id.* at cols. 2-3, MVMA App. at 97a-99a); and (3) the fact that these Rabbits and Chevettes were being used by people who had *voluntarily* purchased them equipped with passive belts:

> "Having voluntarily invested in automatic restraints, they are more likely to use those restraints than someone who is compelled to buy them." *Id.* at col. 3, MVMA App. at 98a.

On this basis, and given "the lack of any directly relevant data" on the issue (46 Fed. Reg. 53,420 col. 3, MVMA App. at 94a), NHTSA decided that it could not extrapolate from the experience of these Rabbits and Chevettes to the situation under a mandate. According to the court, this "merely left the agency with no data" upon which to predict future use rates. 680 F.2d at 231

n.30, MVMA App. at 52a (emphasis deleted). It is no "mere" matter, however, for an agency to have no data on whether a costly regulation, soon to take effect, will accomplish its purpose. The District of Columbia Circuit has stated that "[i]ndeed, an agency should not continue to regulate unless it can clearly identify the harm it seeks to remedy." *NAACP*, 682 F.2d at 1000-01. It is no less true that NHTSA should not continue to regulate if it cannot assure that a previously chosen remedy will remain effective in the future.[11]

The court also ruled that "NHTSA's reasons for refusing to extrapolate from the available data are extremely weak." 680 F.2d at 231 n.30, MVMA App. at 52a. It reached this conclusion on the basis of its own extensive reweighing of the evidence.[12] But the court can-

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[11] The court's ruling in this regard is seriously undermined by another passage in its decision:

> "If NHTSA was uncertain that Modified Standard 208 would lead to the required usage increase, it could reasonably have decided to suspend or amend the regulation rather than plunge ahead in the blind faith that the standard would succeed. . . . But it is one thing to decide that evidence fails to show the wisdom of continuing with a regulatory program, and quite another to decide that evidence shows the regulatory program should be abandoned altogether." 680 F.2d at 232, MVMA App. at 54a.

There may be some difference between the two approaches described here, but it is not so great as to prevent NHTSA from choosing one over the other. This is especially true in light of NHTSA's statement that it "is still committed" to "its original intent, the widespread offering of automatic crash protection that will produce substantial benefits." 46 Fed. Reg. 53,426 col. 2, MVMA App. at 116a.

[12] The court basically drew its conclusions from opinion surveys of car owners. *See* 680 F.2d at 231 n.30, MVMA App. at 52a-53a. However, the District of Columbia Circuit has previously noted that the discretion to reject data "is peculiarly necessary where the expert evidence consists of the results of a public opinion poll—data that is open to a wide variety of errors." *United States v. Halde-*

not reject administrative inferences solely because it disagrees with them. A "reviewing court does not reweigh the evidence or reject reasonable agency inferences simply because other inferences might also have been reasonably drawn." *Laird v. Interstate Commerce Commission*, 691 F.2d 147, 150 n.4 (3d Cir. 1982) (citations omitted). As this Court has stated,

> "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. [Citations omitted.]" *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

**B. The Court Had No Basis for Rejecting NHTSA's Judgment on the Issues of Equity and Unjustifiable Hazard**

In NHTSA's judgment, the passive restraint mandate posed a serious problem of equity:

> "Responsible regulatory policy should generally strive to ensure that the beneficiaries of regulation bear the principal costs of that regulation. . . . The automatic restraint requirements of the standard would

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*man*, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

The very terms used by the court in its analysis indicate that NHTSA's decision was rational nonetheless. According to the court, some of NHTSA's reasoning was "undercut" by a staff analysis, its demographic argument was "somewhat, although not totally, negated," and there were "major difficulties" with one of its conclusions. 680 F.2d at 231 n.30, MVMA App. at 52a. Whatever the validity of these characterizations, they do not establish the lack of a reasonable basis for NHTSA's decision. They do, however, demonstrate that the court engaged in precisely the type of intrusive judicial review against which the District of Columbia Circuit has previously warned:

> "[I]t is important that courts not think themselves licensed to embark upon wide-ranging searches for 'clear errors of judgment.'" *Ethyl Corp.*, 541 F.2d at 35 n.74.

> have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 109a.

The inequity of this situation called into question the reasonableness of the mandate, a factor which NHTSA was required to consider under 15 U.S.C. § 1392(f)(3) *Id.*

The court summarily dismissed this concern on the ground that current manual belt users might realize insurance savings under the mandate. *See* 680 F.2d at 240 & n.43, MVMA App. at 70a. It did so despite NHTSA's judgment that offsetting insurance discounts "would not likely materialize on a general basis,"—a judgment based in part on the reluctance of many insurance companies to reduce their current rates for cars with passive restraints. 46 Fed. Reg. 53,423 col. 3, MVMA App. at 106a. The court's own factual finding involved only the *possibility* of insurance premium benefits to current belt users (*see* 680 F.2d at 240 n.43, MVMA App. at 70a), yet this eventuality nonetheless served, *sub silentio*, to displace the deference owed to NHTSA on an issue of disputed fact.

The costs at issue were not merely financial. NHTSA had rejected the alternative of requiring use-inducing features on passive belts because this might create a new hazard in complicating the evacuation of cars involved in accidents. The agency was "unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would". 46 Fed. Reg. 53,424 col. 3, MVMA App. at 110a.

The court, however, judged the issue strictly as one of cost-benefit analysis. In its view, the

> "regulatory problem facing NHTSA was therefore simple in theory . . . . It had to predict the savings that would result from Modified Standard 208, and compare that savings with the cost of the standard, so as to conduct 'a "commonsense" balancing of safety benefits and economic cost.' [Citation omitted.]" 680 F.2d at 214-15, MVMA App. at 17a.

The question of whether the mandate would create new safety hazards was irrelevant to the court, except to the extent that it entered into this cost-benefit analysis:

> "There is no evidence to support the suggestion that 'further complicat[ing] the extrication' of occupants after collisions, if that occurs at all, *will not be more than offset* by the advantages of increased belt use." 680 F.2d at 236, MVMA App. at 61a-62a (emphasis added).

The creation of new safety hazards, however, is an extremely sensitive issue regardless of whether these hazards are offset by other factors. It is uniquely within NHTSA's expertise, encompassed by its "authority to balance present injuries against possible risks posed by safety equipment." *Pacific Legal Foundation*, 593 F.2d at 1346. It is not an issue which can be judicially usurped merely on the basis of an asserted cost-benefit balance.[13]

### C. NHTSA Was Fully Entitled To View the Ignition Interlock Episode as Relevant to Passive Restraints

It was NHTSA's position that Standard 208 could trigger an adverse public reaction similar to that which occurred during the ignition interlock fiasco. NHTSA believed that such a reaction could be disastrous for other agency measures by producing "a poisoning of popular sentiment toward efforts to improve occupant

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[13] For the reasons fully stated in the briefs of DOT and MVMA, the court's ruling on NHTSA's consideration of alternatives, and on an effective date for Standard 208, should also be reversed by this Court.

restraint systems in the future." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 108a (citation omitted). In the agency's judgment,

> "[n]o regulatory policy is of lasting value if it ultimately proves unacceptable to the public. Public acceptability is at issue in any vehicle safety rulemaking proceeding in which the required safety equipment would be obtrusive, relatively expensive and beneficial only to the extent that significant portions of the motoring public will cooperate and use it. Automatic belt requirements exhibit all of those characteristics." 46 Fed. Reg. 53,424 col. 1, MVMA App. at 107a.

The court dismissed all of this, claiming that "NHTSA's discussion of the interlock is absolutely irrelevant . . . ." 680 F.2d at 234, MVMA at 59a.

NHTSA's assessment of public acceptability was part of its legal obligation under the Safety Act—"the agency cannot fulfill its statutory responsibility unless it considers popular reaction." *Pacific Legal Foundation*, 593 F.2d at 1345. In fact, NHTSA evaluated this issue in a manner identical to that of an earlier Secretary, William T. Coleman, Jr., who had preceded former Secretary Brock Adams. In 1976, Secretary Coleman had decided against mandating passive restraints because of this same likelihood of adverse public reaction. C.A.J.A. 2119-24. As the court in *Pacific Legal Foundation* noted, "Coleman's view of the likely public reaction to passive restraints . . . *had been based largely on the ignition interlock episode.*" 593 F.2d at 1342 (footnote omitted; emphasis added). While Secretary Adams had "squarely rejected" this view soon after taking office (*id.*), this was still "a matter of judgment" for each Secretary to resolve. *Id.* at 1346.

A new administrator has now rejected the view taken by Secretary Adams. But according to the court, what was formerly a matter of judgment now has "absolutely

no evidence to support" it. 680 F.2d at 234, MVMA App. at 59a. Ignoring the decision of Secretary Coleman while it wholeheartedly embraced Secretary Adams' view (*see id.* at n.33, MVMA App. at 59a), the court categorically asserted that "every indication in the record points the other way." *Id.* at 234, MVMA App. at 59a.

The court similarly rejected NHTSA's characterization of mandatory passive restraints as "people-forcing." *See* 680 F.2d at 240 n.43, MVMA App. at 70a. There are two very reasonable views on this question. One is that passive belts do not "force" anything upon people precisely because these devices are automatic. The other no less reasonable view is that a mandate obviously "forces" people into literally being encircled by seat belts. While the court may be entitled to its view (it chose the former), it was certainly not empowered to impose it on NHTSA.

## III

## THIS COURT SHOULD UPHOLD NHTSA'S DECISION RATHER THAN REMAND IT FOR FURTHER PROCEEDINGS ON THE MERITS

This Court has often stated that it will intervene in appellate reviews of agency rule making "only in what ought to be the rare instance when the standard [of review] appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491 (1951); *see, e.g., American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 523 (1981); *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 309-10 (1974). For the reasons previously set forth in this brief, we submit that this is such a case. The court below, however, did not limit its decision to the particular standard of review which it employed. It went on to declare that "[b]y *any* measure of reasoned decisionmaking, NHTSA's action was arbitrary and capricious." 680 F.2d at 239, MVMA App. at 68a (emphasis added). According to the

court, there was "not one iota of evidence" in the record to support NHTSA's decision, and the agency had presented "[n]o logical reason" for its action. *Id.* at 231, MVMA App. at 51a. These statements suggest that the outcome of a remand to the court under some other standard of review may be already predetermined.

While it is not the Supreme Court's "responsibility to assess the record to determine whether agency findings are supported" (*Mobil Oil Corp.*, 417 U.S. at 309), this Court has nonetheless engaged in such analysis on occasion. *See, e.g., Bowman Transportation,* , 419 U.S. at 292 (wherein the Supreme Court, in overturning a district court's invalidation of Interstate Commerce Commission findings, stated that it did "not find the Commission's treatment of the evidence arbitrary"); *Gainesville Utilities Department v. Federal Power Commission*, 402 U.S. 515, 529 (1971) (wherein the Court overturned a Fifth Circuit decision and ruled "that substantial evidence supports the findings of the Commission"); *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106 (1968) (wherein this Court, in overturning an appellate reversal of a district court decision, ruled that the district court's findings "have substantial support in the evidence . . . ."). Given that this case is before this Court, and given the extent to which the substantive issues lie within the special expertise of the agency, and given the lower court's suggestion that its judgment would be the same under any standard of review, we submit that this Court should itself uphold NHTSA's decision under the proper arbitrary and capricious test.

## CONCLUSION

The Court of Appeals' decision constitutes a gross misapplication of the law on both appellate review and the use of legislative history. The court relied on *post hoc*, unenacted congressional reaction to restrict NHTSA's authority to regulate. It constructed a congressional mandate where none existed. On the basis of NHTSA's alleged deviation from this mandate, the court proceeded

to substitute its judgment for that of the agency on matters uniquely committed to administrative discretion.

For this reason, and for the other reasons set forth above, the decision of the Court of Appeals should be reversed and NHTSA's decision upheld on the merits.

Respectfully submitted,

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